Supreme Court, U.S.
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No. 06-1002

In the Supreme Court of the United States

MANDY R., by and through her parents and guardians, Mr. and Mrs. R., *et al.*
Petitioners,

v.

BILL RITTER, Governor of the State of Colorado, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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I. Respondent's Brief in Opposition Offers Unpersuasive Argument Why This Court Should Not Grant Certiorari.

A. A Circuit Conflict Does Exist.

Colorado argues that there is no circuit court case in conflict with the Tenth Circuit since "another circuit would have to hold that a State must actually provide medical services and not just promise to pay for them." Respondent's Brief at 8. This argument, however, is premised on the faulty assumption that the question presented required Colorado to be an actual service provider. This is incorrect.

This case is about access to medical services, not about who delivers the services. Under the State Plan, services can be furnished *either* by the State or a private entity. The same fact pattern existed in *Bryson v. Shumway,* 308 F.3d 79 (1st Cir. 2002) and *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998). The question presented merely poses the issue of whether the State must "ensure" that services are furnished. The state can discharge its obligation either by furnishing medical services directly or arranging for medical services to be furnished in private settings. The trial court correctly noted that this alternative relief was requested by the Petitioners. *See*, Pet. App. at 43a. Just as in *Bryson* and *Doe*, the issue is one of access and whether or not waiting lists are permissible for mandated medical services under the federal Medicaid scheme. *Bryson* and *Doe* both invalidated waiting lists for Medicaid services and the Tenth Circuit opinion here is clearly to the contrary.

Viewed correctly, it does not matter why there is a waiting list. It may be because the State has insufficient funds or it may be because the State refuses to license additional bed

capacity. In this case, Colorado no longer argues insufficient funds. It concedes that "[g]iven that there are about 21 persons waiting for care in an ICF/MR, this requirement does not present a significant obstacle to opening a new ICF/MR in Colorado." Respondent's Brief at 3, n.1. Yet, Colorado has not expanded capacity for either private or public ICF/MR facilities. Instead, it has contracted capacity. Contraction instead of expansion in the face of demonstrated need violates the Medicaid statute.

B. Colorado's Interpretation Of "Furnish" Violates The Medicaid Statute.

Colorado offers a strained definition of the word "furnish". It states that a state may "furnish payments as well as services." Respondent's Brief at 7. The word "furnish" cannot logically be read to mean only "payment".[1] In the interpretation of statutes, unless Congress indicates otherwise, this Court will give words their common meaning as used in the English language. *See, Gollust v. Mendell*, 501 U.S. 115, 124 (1991)(interpreting the word "institute" as it is commonly used). Black's Law Dictionary defines "furnish" as to "supply or provide, ... implying some degree of active effort to accomplish the designated end, ... supply or provide in any way other than by sale." Black's Law Dictionary, 804 (Revised 4th Ed. 1968).

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[1] Colorado concedes that 42 C.F.R. § 435.930(c) imposes a duty on it greater than mere payment. But then it incorrectly observes that subsections (a) and (b) limit "furnish" to payment while subsection (c) does not. The more logical explanation is that subsection (c) requires that immediate services be furnished, whereas subsection (a) requires "prompt" furnishing of services. This means service within 90 days. *See*, 42 C.F.R. § 435.911(a)(1).

C. The Federal Form Colorado Completed Gives More Than Payment Assurance To CMS.

Colorado argues that the boxes it checked on a federal form do not require it to "promise[d] that it will provide ICF/MR services." Respondent's Brief at 5. This is incorrect. The form itself is not limited to payment only as it is entitled "Amount, Duration and Scope of Medical and Remedial Care and Services to the Categorically Needy ." Pet. App. F. By limiting the form to payments only, the terms "duration and scope" are effectively treated as surplusage.

D. Colorado Operates No Large Institutions So It Can Easily Accommodate Petitioners' Needs.

Colorado argues that "all of the petitioners indicated they were not interested in placement in a large institutional ICF/MR such as the ones operated by Colorado." Respondent's Brief at 2. But Colorado no longer operates "large" institutions. *See*, *e.g.*, Petitioner's App. at 48a (Kipling Village operates small group homes with no more than six individuals in each group home.) When the answers to the questions asked of petitioners are read carefully, it is clear that petitioners would accept small group homes in public or private ICF/MR facilities. Respondent's App. A-2 to A-8. An "institution" can be a group home with as little as four residents.

E. CMS' Position Is Consistent With The *Doe Case*.

Colorado seeks comfort in the fact that in 1993 CMS provided technical advice on better ways to manage the waiting list for HCBS waivered services. *See*, Resp. App. A-1. The inference is that CMS does not care about the separate

ICF/MR waiting list for mandatory services. Colorado, however, has never informed CMS about the separate ICF/MR waiting list nor can it point to any legal authority supporting the existence of an ICF/MR waiting list beyond 90 days. To the contrary, CMS supported the federal ruling in *Doe* in subsequent litigation by expressly approving Florida's State Plan Amendment that ICF/MR waiting lists could not exceed 90 days and that Florida must ensure the delivery of services at the end of 90 days. *See, Doe, 1-13 ex. rel. Doe Sr. 1-13 v. Bush,* 261 F.3d 1037, 1044 (11th Cir. 2001) ("The time from placement on the waiting list until admission to an ICF/DD for such persons will not exceed 90 days.")

CONCLUSION

The Petition for a writ of certiorari should be granted.

Dated this 2nd day of March, 2007.

Respectfully submitted,

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